IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY, *Appellants,*

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO, *Appellees.*

On Appeal From The Supreme Court of New Mexico

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I

The Electrical Energy Tax Cannot Escape The Reach Of The Tax Reform Act.

Both sides to this controversy acknowledge that the fate of New Mexico's Electrical Energy Tax Act, Laws of 1975, Ch. 263 (hereinafter "the Energy Tax" or "the Act") is governed, at least initially, by § 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (hereinafter "§ 391"), enacted by Congress during the pendency of this litigation. That statute provides, in perti-

nent part, that no state may impose "a tax on or with respect to the generation or transmission of electricity . . . if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

Appellants have previously shown that this statute, by its plain terms, invalidates any single state tax which is in fact discriminatory as the statute defines that term, and clearly encompasses the Energy Tax. (Brief for Appellants, pp. 19-21.) As anticipated, the State contends that § 391 "adds nothing to the constitutional test," and does not reach the Act. (Brief for Appellees, p. 11.) The fate of the Energy Tax, even under New Mexico's view of the "constitutional test," is discussed below. With respect to the statutory question presented, the State reaches its nullifying conclusion by failing to confront the express language of § 391 and by ignoring its actual legislative history in favor of a more palatable, but essentially fanciful, version.

The talisman "Congress does not pass legislative history, it passes laws" (Brief for Appellees, p. 21) is no sooner invoked than it is abandoned. Rather than focus on the law which Congress did pass, the State proceeds to argue that it is essentially meaningless and supports this argument with reference to excerpts from the legislative history of a bill which was never enacted—Senate Bill 1957. The apparent theory is that opposition to Senate Bill 1957 led to significant dilutions in the language of § 391. This contrived analysis is justified by a need to "read between the lines" (Brief for Appellees, p. 16), a novel approach to legislative history for which the State advances no precedent. More importantly, closer attention to the facts of record reveals that the State's suppositions are both inaccurate and unfounded.

In June 1975, Senator Fannin introduced a measure, as Senate Bill 1957, that prohibited state taxation "with respect to the generation of electricity within such State, to the extent that such electricity is transmitted to and consumed outside of such State." S. 1957, 94th Cong., 1st Sess. § 2 (1975). A brief hearing with respect to the measure was held on March 8, 1976, at which representatives from the States of Washington and West Virginia expressed some concern over its apparent breadth. *Hearing on S. 1957 Before the Subcommittee on Energy of the Senate Committee on Finance,* 94th Cong., 2d Sess. (1976) (hereinafter "Hearing"). This bill was apparently never considered by the Senate Finance Committee, and was never enacted.[1]

Certain observations should be made at this juncture. Initially, the history and fate of S. 1957 are of dubious significance in ascertaining Congressional intent with respect to § 391. This is particularly true when reliance is placed on the statements of those whom New Mexico describes as opponents of S. 1957:

> [W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill they understandably tend to overstate its reach. . . . It is the sponsors that we look to when the meaning of the statutory words is in doubt.

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[1] Any implication that S. 1957 was considered and rejected by the Finance Committee (see Brief for Appellees, p. 16) is wholly unwarranted.

Woodwork Manufacturers Asso. v. *NLRB,* 386 U.S. 612, 639-40 (1967) (quoting *Labor Board* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 66 (1964), and *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394-95 (1951)). *Accord, S & E Contractors* v. *United States,* 406 U.S. 1, 13 n. 9 (1972).

Those considerations aside, the State has itself mischaracterized the objections to S. 1957. The concern expressed by Washington and West Virginia was that S. 1957 was "an overreaction to deal with the specific situation existing between New Mexico and Arizona," *Hearing,* p. 77, and would forbid all taxation of electric generation and grant all power companies immunity from state taxation, whether discriminatory or not. *Id.,* pp. 69, 77, 78, 80, 81. Representatives from both states expressed agreement with the objective of proscribing state taxes which imposed discriminatory burdens on electricity transmitted in interstate commerce for out-of-state consumption. *Id.,* pp. 71, 72, 80. The concern was that the language of S. 1957 went beyond that goal.

The State's argument assumes that Congress had only two options—either to grant total immunity from state taxation to all generation of electricity or to pass "sterile legislation." (Brief for Appellees, p. 11.) The assumption is unwarranted. Congress wanted to and did enact legislation which was specifically directed to discriminatory taxation of the generation and transmission of electricity. As previously explained, a provision to achieve that purpose was added by the Senate Finance Committee to the version of the Tax Reform Act passed by the House of Representatives (H.R. 10612).[2] That is the provision which was to become

[2] The State attempts to rely upon a letter from counsel for one of the appellants (in the State's view, a "lobbyist") to support certain gratuitious assertions concerning the derivation of § 391. (Brief for Appellees, pp. 18-20.) If nothing else, the correspondence in question confirms that § 391 has always been intended to reach the Energy Tax. The State overlooks the fact that the letter in question antedates passage of the bill by the Senate and has no bearing whatsoever on the actions of the Conference Committee. More significantly, simple logic indicates that the process of statutory construction, which has as its purpose ascertaining the intent of the legislative body, should only take into account materials considered by the legislative body as a whole. Materials so far removed from the mainstream of the legislative process are irrelevant to a determination of Congressional intent.

§ 391 and it is on the legislative history of this provision that attention should be focused.

The State cannot and does not dispute the tenor of that legislative history. The Report of the Senate Finance Committee on the Tax Reform Act clearly describes the Energy Tax as an example of the type of discriminatory state taxation to be forbidden. S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. (1976) 437-38, *reprinted in* [1976] U.S. Code Cong. & Admin. News 3865-66 (App. 107-08). The debate and defeat of the "Domenici Amendment" makes that point even more explicitly. 122 Cong. Rec. S. 12712 *et seq.* (daily ed. July 28, 1976). This legislative history cannot simply be ignored:

> When aid to construction of the meaning of the words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

United States v. *American Trucking Asso.,* 310 U.S. 534, 543-44 (1940). *Accord, Train* v. *Colorado Public Interest Research Group,* 426 U.S. 1, 10 (1976); *Cass* v. *United States,* 417 U.S. 72, 78-79 (1974).

When the differing versions of the Tax Reform Act passed by the House and Senate were referred to conference, the Conference Committee made a minor language substitution, changing the words "higher gross or net tax" in the Senate-passed version to "greater tax burden," the formulation eventually enacted. The State characterizes this, again without benefit of citation to the actual legislative record, as a further "dilution" to accommodate lingering concerns from West Virginia and Washington.[3] Even if New Mexico had some factual support for these assertions (and none has been provided), this approach to statutory interpretation has also been rejected:

> [A]s has been noted, the most important committee changes relied upon were made without explanation. The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.

Trailmobile Company v. *Whirls,* 331 U.S. 40, 61 (1947). That is particularly the case where the Conference Committee Report states unequivocally that its version "follows the Senate amendment." H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, *reprinted in* [1976] U.S. Code Cong. & Admin. News 4206, and the language itself evidences no departure or retreat from the Senate's intentions.

When the State's attention finally does turn to the language of § 391, it merely asserts that the statute restates the constitutional test which New Mexico contends requires the examination of its entire scheme of taxation. Assertion, however, is no substitute for analysis. Section 391 itself defines the focus of inquiry—"a [state] tax on or with respect to the generation or transmission of electricity." The Energy Tax is the only tax of that description which New Mexico imposes. The credit provisions of the Energy Tax do not expand the analysis mandated by the Federal statute. They are part and parcel of the Energy Tax—without them, the Energy Tax would not have seen the light of day. Congress clearly dealt with this device by forbidding discriminatory burdens imposed "indirectly," such as by the credit provisions of the Energy Tax.

[3] The State also asserts that these concerns were frequently brought out "during the debate in Congress." (Brief for Appellees, p. 13.) The only debate of substance was concerned with the Domenici amendment, and the only concern expressed was that of Senators Domenici and Montoya for the fate of the Energy Tax, 122 Cong. Rec. S. 12712, *et seq.* (daily ed. June 28, 1976).

II

New Mexico Tacitly Concedes That The Energy Tax Discriminates Against Interstate Wholesale Transactions.

On the constitutional question, the bulk of New Mexico's argument is devoted to supporting the New Mexico Supreme Court's hypothesis that the question of discrimination against interstate commerce is to be resolved by examining "the *entire tax structure* of a state as applied to the *particular commodity* which is taxed. . . ." *Arizona Public Service Co.* v. *O'Chesky,* 91 N.M. 485, 576 P.2d 291, 294 (1978) (emphasis in original). Even assuming *arguendo* that that is the constitutional test, however, it cannot save the Energy Tax. Analysis of New Mexico's tax structure reveals clear discrimination against wholesale sales of electricity for consumption in other states.

New Mexico's recurrent mischaracterization of the taxes here involved requires some clarification. The Brief for Appellees contains repeated references to a "retail sales tax . . . paid by the consumer" which New

Mexico is claimed to have reduced. (*See, e.g.,* Brief for Appellees, pp. 5, 22, 29, 30, 37.) That is a fiction. New Mexico's Gross Receipts Tax, §§ 72-16A-1, *et seq.,* is imposed upon the retail vendor. The ultimate burden upon the consumer of the Gross Receipts Tax is not reduced one whit by the credit provisions of the Energy Tax. As is graphically shown below, these credit provisions benefit only generators and wholesalers of electricity for local consumption, by wholly expunging any Energy Tax liability. These assertions cannot divert attention from the unquestioned discrimination against interstate commerce that occurs at the wholesale level.

If a utility generating electricity in New Mexico sells that electricity at the wholesale level to an entity that transmits it to another state for consumption, the credit provisions of the Energy Tax are inapplicable and the tax must be paid. If, on the other hand, that electricity is wholesaled to a distributor or retailer who markets it for consumption in New Mexico, the provisions of §§ 9(B) and 9(C) of the Act insure that no tax burden will be incurred. In short, even taking New Mexico's entire taxing scheme into account, a wholesale sale of electricity for local consumption is subject to no tax burden whatsoever, while a similar sale of electricity for consumption in other states is subject to the Energy Tax.

New Mexico concedes that this is the case, but responds that this explicit discrimination "is purely a matter of form." (Brief for Appellees, p. 30.) This cavalier statement cannot survive an analysis of New Mexico's actual tax treatment of a hypothetical 100,000,000 KWH generated by an interstate utility, such as APS, as compared with its treatment of the same amount of power generated by a local utility such

as Public Service Company of New Mexico ("PNM"). Section 3 of the Act would impose upon both sets of 100,000,000 KWH a generation tax of $40,000.[4] Let us assume further than the 100,000,000 KWH produced by APS is sold in a wholesale transaction for eventual consumption in California or Arizona, while PNM's is sold to a wholesale purchaser who will eventually market it for local consumption. PNM will assign to its wholesale purchaser its "potential credit" of $40,000, and receive back from that purchaser a reimbursement in that same amount. Its wholesale transaction is effectively tax-free. On the other hand, solely because its electricity will *not* be consumed in New Mexico, APS cannot use the credit provisions of §§ 9(B) and (C), and it will pay a generation tax of $40,000.

As this Court has noted, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 70 (1963). As demonstrated, New Mexico imposes a "dollars and cents" Energy Tax burden on wholesale sales of electricity in interstate commerce and none whatsoever on similar sales for local consumption. That is not a matter of form—that is impermissible discrimination, even under the standard the State advocates.

The other arguments advanced by the State, directed as they are to establishing a constitutional test which the Energy Tax cannot satisfy, do not require extensive treatment. The State again resorts to the fiction that the Energy Tax is only a reduction of its sales tax

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[4] This hypothetical figure represents approximately 10% of the 997,542,752 KWH generated by appellants in New Mexico in July 1975 alone. (App. 39, 45, 56, 62, 69.)

with respect to electricity, and describes hypothetical taxes which it could have enacted, which would achieve (it claims) the same result as the Energy Tax, and which (it contends) would pass constitutional muster.

The obvious premise of this argument is that, given a permissible end result, New Mexico may select whatever means it chooses, no matter how discriminatory or unconstitutional, to achieve it. That hardly commends itself as a principle of constitutional law. In any event, the invitation to debate the constitutionality of hypothetical alternative taxes, which New Mexico concededly did *not* enact, is beside the point:

> Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found.

McLeod v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). *Accord, Travelers Ins. Co.* v. *Connecticut*, 185 U.S. 364, 371 (1902).

Equally unavailing is the State's reliance on § 9(A) of the Act as an "obvious effort to achieve equality." (Brief of Appellees, p. 6.)[5] Section 9(A) merely offers a credit against New Mexico's Gross Receipts Tax for any tax imposed by another state upon electricity generated there and transmitted to New Mexico for consumption. Its availability is pointedly limited to taxes imposed upon electricity consumed in New Mexico,

[5] The legislative history of the Energy Tax belies any effort on the part of the New Mexico legislature "to achieve equality." (See Brief for the Appellants, pp. 41-45.) It also demonstrates that the intent of the credit provisions was not to avoid "pyramiding of taxes" (Brief for Appellees, p. 6), but to collect revenue solely from interstate commerce.

and merely insulates local utilities from any sister state's retaliation against the Energy Tax. It does nothing to relieve the discriminatory burden New Mexico places on power generated in New Mexico and consumed elsewhere, and is constitutionally insufficient to save the Energy Tax. *Cf. Austin* v. *New Hampshire*, 420 U.S. 656, 666-67 (1975); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 573-74 (1949).

III

New Mexico's Due Process Argument Is Wholly Irrelevant.

In an attempt to inject into this appeal an issue charged with some emotional overtones, and divert attention from the questions actually presented, the State reaches to discuss certain environmental damage and increased social service costs claimed to result from the generation of electricity within New Mexico. (Brief for Appellees, pp. 6-8, 34-35.) This is done by positing the possibility that "there may be an argument as to the legitimacy of New Mexico's interest in taxing the production of electricity within its borders." (*Id.*, p. 6.) This is simply a variation of the "straw man" technique—New Mexico, for whatever purpose, is attempting to defeat an argument which has not been made.

The "record" on this issue to which New Mexico alludes consists of various affidavits submitted in the trial court with the State's Motion for Summary Judgment. (App. 115-41.) Even under the most charitable analysis, these conclusory pleadings do not qualify as opinions, and they are certainly not "uncontroverted factual information" as the State claims. (Brief for Appellees, p. 9.) Given the procedural posture in which the issues were resolved by the trial court, there

was not opportunity to controvert these matters. Nor was there need to do so. The assertions contained in these affidavits were immaterial in the Santa Fe District Court and they are equally immaterial here.

The simple answer to the State's tactic is that the anticipated argument has not been made. Appellants do not question the principle that interstate commerce must pay its own way, and do not dispute that their activities in New Mexico create a sufficient jurisdictional *nexus* to support taxation by New Mexico. *See Colonial Pipe Line Co.* v. *Traigle,* 421 U.S. 100 (1975); *Gen'l Motors Corp.* v. *Washington,* 377 U.S. 436 (1964). Indeed, appellants have paid and continue to pay a variety of taxes in significant amounts to New Mexico and its political subdivisions. (App. 39, 45, 56, 63, 69, 78-83.)

Appellants do not complain of taxation by New Mexico—they complain of discriminatory taxation. The fact that interstate commerce must pay its own way cannot justify, and has never justified, the imposition of state taxes that burden interstate commerce but not similarly situated local enterprises.[6] That is the precise flaw of the Energy Tax, and it cannot be masked by the discussion of considerations pertinent only to an anticipated argument that has not been made.

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[6] New Mexico glosses over the fact that a local utility, Public Service Company of New Mexico, is an equal co-owner of the San Juan Generating Station, and an equity participant in Four Corners, which are apparently the two power plants to which the State refers. (App. 33, 66.)

CONCLUSION

For the reasons stated herein and in the Brief for Appellants, it is respectfully submitted that the lower court's opinion should be vacated, and New Mexico's Electrical Energy Tax Act declared unconstitutional.

Respectfully submitted,

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